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IN THE

Supreme Court of the United States

October Term, 1942.

No. 404.

WYATT D. SHULTZ and CAROLYN SHULTZ, as Co-Executors under the Last Will of Albert B. Shultz, Deceased,

Petitioners,

vs.

MANUFACTURERS & TRADERS TRUST COMPANY, Individually and as Co-Executor under the Last Will of Albert B. Shultz, Deceased, *et al.*,

Respondents.

PETITION FOR REHEARING OF APPLICATION FOR CERTIORARI

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JULES C. RANDAL,
Petitioners' Counsel.

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Consolidated Causes

PETITION FOR REHEARING OF APPLICATION FOR CERTIORARI

This is a petition for rehearing of an application for certiorari (denied October 26th, 1942) to the United States Circuit Court of Appeals for the Second Circuit, and for the granting of a writ as prayed for in the original petition.

I.

It is respectfully submitted that certiorari should be granted because the Circuit Court of Appeals has here decided a federal question in a way in conflict with the decisions of this court in *Kirby* v. *Lake Shore & M. S. Railroad,* 120 U. S. 130 and *Michoud* v. *Girod,* 4 How. 503, 560-561.

The Circuit Court of Appeals has here held that because a concurrent remedy exists at law, suits in equity against agents for an accounting of concealed profits made at the expense of their principal,[1] and for other relief, are

[1] In these cases, the statute of limitations was applied on the theory that Shultz, petitioners' testator, had appointed the Bank his agent to sell his shares in Houde Engineer-

barred in six years after *the occurrence* of the acts complained of, under the state statute of limitations, although the plaintiffs did not discover and were not on notice of the fraud until after the expiration of the six year period and shortly before the commencement of the suits.[2]

In each of the two decisions of this court above cited, it was held that a suit in equity to recover secret profits might be maintained after the expiration of the period of the state statute of limitations if the inequitable conduct of the defendant had been concealed, and if suit was commenced promptly on the discovery of the facts. In each case there was a concurrent legal remedy.[3] In the *Kirby* case, the defendants had contracted to carry freight for the plaintiff's interstate at the lowest rate, or to make an allowance to compensate for a lower rate given to any other shipper. The defendant had secretly given lower rates to other shippers. The Circuit Court for the Southern District of New York held that the suit could not be maintained, since, as it held, the New York courts would, irrespective of the concealment, treat the case as barred by the statute of limitations applicable to an action at law

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ing Corp. The Bank found a purchaser, with whom it secretly shared in the profits of a resale of the shares. The court held that the agreement under which the Bank shared in the resale profit was made two days after the agreement between the Bank, as Shultz' agent, and the purchaser; and that therefore, under New York law, the cause of action at law for such secret profits was in the nature of assumpsit rather than fraud. The participation by the Bank's officers in the resale profits was unknown to Shultz (128 F. (2d) 893); according to Judge Frank, these arrangements were elaborately concealed (pp. 898-899).

[2] 128 F. (2d) p. 901; R., vol. I, pp. 2-4, 16; vol. II, pp. 866, 871-3.

[3] *E. g. Sandoval* v. *Randolph*, 222 U. S. 161; *Standard Oil Co.* v. *Van Etten*, 107 U. S. 325, 332, and cases collected at 1 C.J.S. 733, Account Stated, §53-b.

on contract.[4] *Michoud* v. *Girod,* supra, was a suit against executors for an accounting of profits out of concealed transactions in their individual capacities in the assets of the estate.

The *Kirby* and *Michoud* cases stand for the proposition that state statutes of limitations, which bar relief after the expiration of a given time from the occurrence of the act complained of, irrespective of when discovered, will not prevent federal courts from exercising their equity jurisdiction arising from the Constitution and the original Judiciary Act to relieve against concealed fraud, where and when it comes to light. The case at bar directly presents the question reserved by this court in *Russell* v. *Todd,* 309 U. S. 280, 294 as to

> "the extent to which federal courts, in the exercise of the authority conferred upon them by Congress to administer equitable remedies, are bound to follow state statutes and decisions affecting those remedies."

In *Russell* v. *Todd,* this court (at pp. 290-93) found that the New York statute of limitations, if applicable, would

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[4] Although the court went on to hold that the suit was barred by the plaintiff's laches, the determination that laches and not the statute of limitations constituted the applicable limitation was a matter of decision by this court, not dictum. At 120 U. S. p. 134, this court posed the question as follows:

> "Did the circuit court err in adjudging that the suit was barred by the Statute of Limitations?"

At p. 139, this court answered the question, holding as follows:

> "It results that even if this be not an action 'to procure a judgment, other than for a sum of money, on the ground of fraud,' within the meaning of the New York Code of Procedure, the limitation of six years, being applied here, does not, as adjudged below, commence from the commission of the alleged frauds."

bar the suit in ten years, whereas it had been brought in less than four years. In the case at bar, the court held the suit, brought less than ten years after the commission of the wrongs complained of, barred by the six year statute of limitations of New York.

Erie Railroad Co. v. *Tompkins,* 304 U. S. 64, and *Ruhlin* v. *New York Life Insurance Co., id.* 202, do not prevent the federal courts from giving full effect to the salutary principle of the *Kirby* and *Michoud* cases. Dealing only with substantive law, neither the *Erie Railroad* nor *Ruhlin* case suggests that the powers of a federal court of equity can be clogged by a state statute of limitations, procedural in character,[5] which rewards with immunity the perpetrator of a fraud agile enough to conceal his misdeeds for the statutory period.

This court has recently refused to permit a district court to grant a remedy conferred by statute but unknown to the equity jurisdiction of the federal courts. *Kelleam* v. *Maryland Casualty Co.,* 312 U. S. 377, 381-382. The doctrine of the independence of the federal courts in matters of equity procedure, re-emphasized by this court in *Atlas Life Insurance Co.* v. *Southern,* 306 U. S. 563, 568, should

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[5] Statutes of limitation are procedural law, not substantive law. *Townsend* v. *Jemison,* 9 How. 407, 413; *Campbell* v. *Holt,* 115 U. S. 620, 624-628; *Michigan Insurance Bank* v. *Eldred,* 130 U. S. 693, 696; *Central Vermont Railway Co.* v. *White,* 238 U. S. 507, 511; *Lightfoot* v. *Davis,* 198 N. Y. 261, 264; *Warner* v. *Buffalo Drydock Co.,* 67 F. (2d) 540, 542. Hence they cannot limit the right of parties to litigate in the federal courts causes of action of an equitable nature. *Ridings* v. *Johnson,* 128 U. S. 212; *Payne* v. *Hook,* 7 Wall. 425; *Mississippi Mills* v. *Cohn,* 150 U. S. 202; *Guffey* v. *Smith,* 237 U. S. 101; although in such suits the statute of limitations will be applied by analogy as a measure of the doctrine of laches, where to do so will not conflict with equitable principles. *Russell* v. *Todd,* 309 U. S. 280, 287-288.

not be nullified in this case, where to do so will confirm to the respondents the fruits of their long concealed fraud.[6]

II.

A further reason for the allowance of certiorari here is that the Circuit Court of Appeals has decided a question of local law in a way which conflicts with the applicable local rule. The Circuit Court of Appeals decided that all remedy against the respondent Rea was barred by the six year statute of limitations (New York Civil Practice Act, §48). It is admitted on the record that Rea was absent from and a non-resident of New York for seven years and four months (R. vol. II, pp. 1416-17; vol. I, p. 602); and that suit was commenced against him within six weeks after his return (R. vol. I, p. 3). If the court was right in holding the New York statute of limitations applicable, it should have nonetheless held that the statute did not bar the cause of action against Rea because the time of his absence should have been deducted in computing the period of his limitation (New York Civil Practice Act, §19; *Connecticut T. & S. D. Co.* v. *Wead*, 172 N. Y. 497, 503).

WHEREFORE it is respectfully prayed that a rehearing be granted on the petition for certiorari and that the writ be allowed.

Dated: New York, November 10, 1942.

WYATT D. SHULTZ
CAROLYN SHULTZ
as Co-Executors under the Last Will of Albert B. Shultz, Deceased.

ELLSWORTH C. ALVORD,
JULES C. RANDAL,
Petitioners' Counsel

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[6] See opinion of Judge Frank, 128 F. (2d) pp. 897-901.

Certificate Pursuant to Rule 33

We hereby certify that we have read the foregoing petition and fully believe that it is interposed in good faith and not for delay.

ELLSWORTH C. ALVORD,
JULES C. RANDAL,
Petitioners' Counsel.

Dated: November 12, 1942.

New York Civil Practice Act, §19

"§19. **Effect of defendant's absence from state or residence under false name.** * * * If, after a cause of action has accrued against a person, he departs from the state and remains continuously absent therefrom for the space of one year or more, * * * the time of his absence * * * is not a part of the time limited for the commencement of the action. * * *"